IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 57 of 1978

Between:

1. MOISESE RADREU
2. TOBIA SAUNIVARU — Appellants

and

1. EMPEROR GOLD MINING COMPANY LIMITED
2. EMPEROR TIMBER INDUSTRIES COMPANY LIMITED
3. NATIVE LAND TRUST BOARD — Respondents

S.M. Koya for the Appellants
B.C. Patel for the First Respondent
A. Kato for the Second Respondent

Date of Hearing: 27 November 1978
Delivery of Judgment: 30/11/78

JUDGMENT OF THE COURT

Henry J.A.

This is an appeal against the dismissal of an action brought by appellants for damages for trespass to native land being an alleged wrongful entry and cutting down and removal of timber standing on native land owned by the mataqali Navakadevo. The action was brought by appellants suing on their own behalf and as representing 45 other members of the said mataqali. It was stated in the statement of claim that the land of the mataqali Navakadevo, containing approximately 4,787 acres adjoined lands owned by members of the mataqali Virara and the mataqali Nabusiniga. The location of the area was shown on a plan annexed to the statement of claim. It was alleged that first respondents had been felling and removing trees from the said adjoining lands and had, without appellants' consent or authority, trespassed and unlawfully cut and removed timber from the land of the mataqali Navakadevo.

An amended statement of defence denied trespass and claimed that by an agreement in writing entered into on May 28, 1971 (hereinafter called "the concession agreement") the Native Land Trust Board granted to the Emperor Gold Mining Co. Ltd. the right to enter upon and to fell and remove timber from the land of the mataqali Navakadevo. The Emperor Timber Industries Co. Ltd. is a subsidiary of the Emperor Gold Mining Co. Ltd. and acted as a sub-contractor and agent. The concession agreement does not refer in terms to any of the said mataqali. It contains a description of an area which was called the Koroboya Forest concession. This description gave a detailed account of the boundary lines with reference to landmarks and was accompanied by a plan which delineated the area.

In reply appellants denied that land owned by the mataqali Navakadevo was contained in the concession agreement and further made a specific allegation that the lands of the mataqali Navakadevo were outside the concession agreement. First respondents also filed a counterclaim for loss of revenue by reason of stoppage of work on the said land. The counterclaim is now of importance only as a matter of pleading since no decision appears to have been given in respect of it. The learned judge said it was not pressed. Appellants in their defence to the counterclaim repeated the assertion that the said lands were outside the area described in the concession agreement and further claimed in paragraph 1 that:

> "(b) that in any event the said Concession Agreement is in law void and or is not binding on the Mataqali 'Navakadevo' or the Plaintiffs;
>
> (c) that the Defendants had no consent or authority from the Plaintiffs to cut and remove logs from the land owned by the Mataqali 'Navakadevo';"

First respondents applied for an order joining the Native Land Trust Board as a third party and an order to that effect was made on December 3, 1976. In the statement of claim against the Native Land Trust Board first respondents claimed an indemnity in respect of any liability for damages by reason of timber felling operations on the land of the mataqali Navakadevo on the basis that the Native Land Trust Board had represented that it had the powers necessary to grant such rights over the said land. A number of grounds of defence were pleaded but it is now sufficient to state that the Native Land Trust Board asserted that it had authority and power under the Native Land Trust Ordinance (Cap. 115) to grant such rights over the land of the mataqali Navakadevo as were granted in the concession agreement and that the concession agreement did include native land owned by the mataqali Navakadevo. It is now convenient to deal with the adding of the third party.

An order was made for trial of the issues. The relevant parts of that order are:

> "5. THAT the Third Party be at liberty to appear at the trial of this action, and take such part as the Judge shall direct, and be bound by the result of the trial.
>
> 6. THAT the question of the liability of the Third Party to indemnify the defendants be tried at the trial of the action or subsequent thereto or immediately thereafter."

In Barclay's Bank v. Tom [1923] 1 K.B. 221, 223 Scrutton L.J. said:

> "Now I think it is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that

> matter between the defendant and the third party the plaintiff has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the plaintiff and himself, for otherwise he might be at a great disadvantage if, having fought the case against the plaintiff and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions. With these objects in view the third party order usually provides that the third party may appear at the trial between the plaintiff and the defendant."

If the plaintiff considers he has a direct claim against the third party his proper course is to amend his statement of claim and make the third party a defendant: Edison & Swan Electric Light Co. v. Holland: 41 Ch.D. 28, 32.

In opening the case for appellants in the Court below their counsel stated that it had been agreed between the plaintiffs (appellants) and the third party that the area in question was and is a native reserve. Counself or first respondents (then defendants) made it perfectly clear, and it is not in question, that no such

admission was being made by him as counsel for defendants and that he was not bound by it. The importance of this issue had not emerged at this stage because the main issue was whether or not the concession agreement included the land of the mataqali Navakadevo. No specific issue on whether or not it was a native reserve had been raised. The statement of claim referred to native land. The statement of defence admitted this and pleaded leave and licence to cut and remove timber by virtue of the concession agreement. The concession agreement described the land as native land. So far as concerns the first respondents the case went to trial on the basis that the land was native land and that the concession agreement was in respect of native land.

At the conclusion of the case for the plaintiffs and defendants, counsel for the third party called evidence. The witnesses were cross-examined by counsel for defendants and counsel for plaintiffs. While the second witness was giving evidence in chief counsel for appellants (plaintiffs) objected to a question. The record shows the incident as follows:

> "Mr. Koya:
>
> I think we have agreed with N.L.T.B. that this is Native Land Reserve.
>
> Mr. Kato:
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> A proclamation in the Gazette set this aside as Native Reserve Land. The wording of the Gazette is not clear and we are not sure if this is correct. We might agree that this is Native Reserve, but we may be wrong.
>
> It does not really matter whether this is Native Reserve for the purpose of leasing.

Mr. Koya:

> I am now somewhat concerned as to the intention of my learned friend. We had proceeded on the ground that this was Native Reserve.
>
> The N.L.T.B. have conceded that this was Native Reserve."

The learned judge in his judgment makes it clear that counsel for first respondents (defendants) took no part in this episode. It is clear that the admission was made only on behalf of the Native Land Trust Board and that, at all times, if it were an issue, no such admission was being made by counsel on behalf of first respondents. The importance of proof that the said land was a native reserve will become apparent when the relevant legislation is examined.

The learned judge held that it was proved that the said land was included in the concession agreement. He further held that there was no proof that the said land was a native reserve. The concession agreement was held to have been validly granted by the Native Land Trust Board pursuant to its statutory powers. It was argued in this Court by counsel for first respondents in the alternative that the learned judge ought to have accepted the submission of counsel that the provisions of the Native Land Trust Ordinance (Cap. 115) had no application to the concession agreement because:

> "(a) the Forest Licence (Exhibit D2) and Concession Agreement (Exhibit D3) were not a 'dealing in land'.
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> (b) sections 8 and 16 of the Native Land Trust Act were subject to the overriding provisions of the Forest Act.
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> (c) the Forest Licence (Exhibit D2) and the Concession Agreement (Exhibit D3) were issued under and governed by the Forest Act."

This is now the subject matter of a cross-appeal.

The Native Lands Ordinance (Cap. 114) is a general Ordinance relating to native land. "Native lands" means lands which are neither Crown Lands nor the subject of a Crown grant (section 2). The Ordinance does not require further consideration. The Native Land Trust Ordinance (Cap. 115) is an Ordinance relating to the control and administration of native lands. Section 2 enacts that unless the context otherwise requires:

> "'native land' means land which is neither Crown land nor the subject of a Crown or native grant but includes land granted to a mataqali under section 18 of this Ordinance;
>
> 'native reserve' means land set aside and proclaimed as such under the provisions of this Ordinance;"

A native reserve is accordingly a species of the genus native lands.

By section 3 (as amended in Ordinance 19 of 1968) a body corporate was constituted under the name of the Native Land Trust Board. By subsection (5) the Board may from time to time make rules as to its own proceedings and the carrying out of the powers vested in it. Under section 4 the control of all native land is vested in the Board and all such land shall be administered for the benefit of the Fijian owners. The expression "Fijian owners" would appear to be a wider term than "native owners" who are defined as the mataqali or other division or subdivision of the natives having the customary right to occupy and use native land (section 2). Counsel for appellants argued at some length on the nature of the title of the native owners. It is not necessary to pursue this argument because it has been accepted that it is the control and

administration of native lands which is vested in the Board. There are no words in the Ordinance which might vest in the Board any title to native lands. The whole tenor of the Ordinance is to restrict the rights of the native owners to deal with their lands except either through the act of the Board or with its consent. This is a sufficient general description of the effect of the Ordinance.

If the land of appellants is a native reserve the position is clear. Section 16(1) provides:

> "16(1) Subject to the provisions of the Crown Acquisition of Lands Ordinance, the Forest Ordinance, the Oil Mines Ordinance, the Mining Ordinance, and to the provisions of this section, no land in any native reserve shall be leased or otherwise disposed of."

Subsections (2) and (3) contain exceptions which do not apply. Thus the Board had no power to grant to the Emperor Gold Mining Co. Ltd. a licence in respect of the said land if it were a native reserve. Counsel for first respondents did not argue to the contrary but based the cross-appeal on grounds which counsel contended enabled a valid licence in the form of the concession agreement and the Forest Licence to be granted. The first question to be determined is whether or not the land is, on the evidence in the case, a native reserve.

Earlier in this judgment the pleadings were reviewed. The claim of appellants was in respect of native land and the case went to trial on that basis. First respondents were not bound to prove anything further than that they had, in respect of what was stated to be native land, a grant from the Board in respect of native land. If appellants desired to establish that the grant was not in respect of native land but was in respect of a special kind of native

land the burden was on them so to plead and prove the fact. At the opening of the case counsel for appellants announced an agreement between himself and counsel for the third party (the Board) that the land was native reserve. Counsel for first respondents then, and throughout the trial, made it plain that any such concession was not accepted by him. At the time when counsel for appellants first announced the admission made by counsel for the Board it is clear that no issue arose on this question under the pleadings and that the issue being tried was not the liability of the Board but the liability of the first respondents to appellants. It was only, if that liability were established as between appellants and first respondents, that an issue arose whether or not the Board was bound to indemnify the first respondents. This issue was of no concern to appellants and was irrelevant to their case. The admission, being irrelevant in the trial between appellants and first respondents, should have been ruled out. It is clear that counsel for respondents made it abundantly plain that, and it is trite law, only an admission made by a party or his authorised agent may be tendered as evidence of a fact. Counsel for the Board had no authority and no standing in the action between appellants and first respondents to make any admission against the interests of first respondents in the claim made against them by appellants. No authority is necessary for this proposition which is a clear matter of general principle.

The finding just made disposes of those parts of the grounds of appeal which claim:

(a) that such admission was ample proof for all purposes at the trial and that it was binding on first respondent and dispensed with the normal requirements

to adduce oral or documentary evidence in proof of the fact that the land was a native reserve, and,

(b) that the learned judge erred in holding that the fact that the land is native reserve must be expressly pleaded.

Ground 3 is lengthy but it is better to set it out rather than to paraphrase it. Ground 3 reads:

"3. THAT as the Second Respondent admitted that the land in question was a 'Native Reserve', it followed that there was clear evidence pointing to the illegality of the transaction contained in the Concession Agreement (Exhibit 'D3') and thereafter the learned trial Judge erred in law in not making an appropriate finding as to illegality and in not awarding damages to the Appellants. The Appellants further complain that it was the duty of Court not to allow its process to be abused or lend to give any assistance to the First Respondent once it was established that the transaction in question between the First Respondent and Second Respondent was illegal by operation of Section (16) of the Native Land Trust Act Cap. 115."

The second part of ground 3 has already been dealt with in so far as appellants failed to establish that the land was a native reserve. The onus was on appellants to establish the allegation. Since the only material put forward has been held to be irrelevant and therefore inadmissible as against first respondents there is no proof that the land was a native reserve. So this part of ground 3 must fail. The first part of ground 3 was expanded during argument to the effect that the Court should, as a result of the admission made by counsel for the third party, have entered upon some

inquiry of its own motion into the question whether or not the land was a native reserve. This ground overlooks the later explanation given by counsel for the Board that the position was not clear and counsel was not sure what the true position was. Counsel for appellants neither sought an inquiry nor sought any amendment of his pleadings. Counsel now urges that it was the duty of the Court to enter into an inquiry without more ado and to adjudicate upon an issue which was not raised in the pleadings and which, when it was raised as a matter of agreement between counsel for appellants and counsel for the Board, counsel for first respondents adopted a clear attitude that his clients were not making any such admission.

The general law on this topic is summarised by the learned authors of Law of Contract Cheshire & Fifoot 9th Edn. p. 363 where the following passage appears:

> "The rules of evidence that govern the proof of illegality, whether the contract is illegal by statute or at common law, may be summarized as follows:
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> Firstly, where the contract is ex facie illegal, the court takes judicial notice of the fact and refuses to enforce the contract, even though its illegality has not been pleaded by the defendant.
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> Secondly, where the contract is ex facie lawful, evidence of external circumstances showing that it is in fact illegal will not be admitted, unless those circumstances have been pleaded.
>
> Thirdly, when the contract is ex facie lawful, but facts come to light in the course of the trial tending to show that it has an illegal purpose, the court takes judicial notice of the illegality notwithstanding that these facts have not been pleaded. But it must be clear that all the relevant circumstances are before the court."

The leading authorities for these propositions are reviewed in Snell v. Unity Finance Ltd. [1963] 3 All E.R. 50. The above passage is based on the judgment of Devlin J. in Edler v. Auerbach [1950] 1 K.B. 359 where the learned judge made reference to Northwestern Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd. [1914] A.C. 461. Lord Moulton in the last mentioned case said at p. 477:

> " One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure. In such a case the court would act upon it."

None of the situations set out above arose in the present case. The learned judge did not err in failing to inquire into the irrelevant admission, later qualified, made by counsel for a third party in the trial between plaintiffs and defendants - an admission which was irrelevant and inadmissible in the case between appellants and first respondents. Ground 3 fails.

Ground 4 is subdivided into four sub-paragraphs. They are:

> "4. THAT in the alternative the Appellants complain that the learned trial Judge:-
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> (a) misdirected himself and erred in law in holding the view that if the land in question was not a 'Native Reserve', the consent of the Appellants as land Owners was not required before granting the Forest Concession to the First Respondent;"

This is a complaint that the consent of the owners was necessary in respect of the granting of "the Forest concession". This ground, which is not easy to follow,

is based on a submission that the mataqali are the legal owners of the land and their rights as such owners are such that no grant is lawful without their consent and without compliance with section 9. It was argued that sections 7, 8 and 9 when read together had this effect particularly in view of section 4 which did not divest the native owners of the ownership of the land.

Section 7 reads:

> "7. Subject to the provisions of the Crown Acquisition of Lands Ordinance, the Forest Ordinance, the Oil Mines Ordinance and the Mining Ordinance, no native land shall be sold, leased or otherwise disposed of and no licence in respect of native land shall be granted save under and in accordance with the provisions of this Ordinance."

The concession agreement was granted in pursuance of the powers contained in section 8(1) which reads:

> "8(1) Subject to the provisions of the next succeeding section, it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed."

This is the power exercised. Then it is claimed that section 9 requires the prior consent of the native owners. It reads:

> "9. No native land shall be dealt with by way of lease or licence under the provisions of this Ordinance unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and

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> is not likely during the currency of such lease or licence to be required by t he Fijian owners for their use, maintenance or support."

This is a matter of internal procedures of the Board. The concession agreement is valid on its face. If appellants desired to raise this question it ought to have joined the Board as a defendant and pleaded non-compliance with section 9 as an issue in the case. This was an exception to the general powers contained in section 8(1). Appellants should have pleaded the exception and proved the fact. By section 3 subsection (5) the rules for the proceedings and the carrying out of powers of the Board are such as the Board may from time to time make. Any person dealing with the Board is not bound to inquire into its proceedings and how it carries out its powers. The concession agreement is regular on its face. If appellants wished to attack its validity the pleadings must raise the issue and appellants must prove the facts upon which invalidity is based.

> "(b) misdirected himself in not directing his mind to the provisions of Section (7), (8) and (9) of the said Act and in particular that there was no evidence that the Second Respondent had discharged its statutory duty of satisfying itself that the land in question was not being beneficially occupied by the Appellants as Owners and that it was not likely that during the currency of the Concession Agreement (Exhibit 'D3') it would be required by the Appellants for their use, maintenance or support;"

This ground is sufficiently covered by the matters dealt with under (a).

The remaining grounds are (c) and (d). They read:

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"(c) misdirected himself in not holding that the Second Respondent did not act according to equitable principles applicable to Trustees in dealing with the disposition or leasing of lands belonging to cestui que trust;

(d) misdirected himself in not holding that as the effect of the issue of the licence under Concession Agreement (Exhibit 'D3') was to deprive the Appellants and other land owners the use of the land and timber in question for a period of fifteen (15) years from the 1st day of January, 1970 and having regard to all the circumstances, the Second Respondent ought to have acted in accordance of natural justice and that it failed so to do."

Both grounds deal with matters alleged against the Board in its administration of the land of the said mataqali. The Board is not a party to the proceedings which appellants took against first respondents. These matters are not pleaded. Indeed, it is impossible to see how a bona fide dealing with a statutory agent within the express powers given by the statute can give rise to any such question between the statutory agent and the person dealing with such an agent. First respondents are not concerned with "equitable principles" (not defined and not pleaded) which might exist between the principal and agent even though the agent be a trustee. The same applies to the reference to natural justice. All grounds set out in 4(a), (b), (c) and (d) accordingly fail.

Appellants have failed on all grounds of appeal put forward by them so we find it unnecessary to consider further grounds upon which the judgment might be affirmed. The grant was made in pursuance of the provisions of Part II of the Native Land Trust Ordinance (Cap. 115). The transaction required the

grant of a right to enter on the land of native owners and to cut and remove timber. We are not satisfied that the Commissioner of Forests can grant such a licence as against the native owners although he may have wide powers to control or to forbid any such grant: The procedure adopted in this case was a grant by the Board and a licence later issued authorising the exercise of the right in accordance with the Forest Ordinance and Regulations. That is the procedure adopted and the basis on which the case was conducted. The question raised on the cross-appeal can be argued in an appropriate case when the matter has been properly pleaded and put in issue. In the circumstances we express no opinion on the points raised in the cross-appeal. The dismissal of the appeal disposes of the claim by appellants.

The learned judge ordered costs to be paid to first respondents on the higher scale. Costs may be fixed either on a lower or higher scale: Appendix 4 Supreme Court Rules 1968 p. 497 (subsidiary legislation). Costs must be fixed by the exercise of a judicial discretion. In Ritter v. Godfrey [1920] 2 K.B. 47, 61 Atkin L.J. when dealing with a disallowance of costs to a successful party said:

> " I am aware of the invoncenience of fettering by rules the exercise of what in terms appears to be an unfettered discretion. But it is too late to contend for an arbitrary discretion over costs: some rules undoubtedly there are that control the discretion: and it seems hard to require a judge to exercise his discretion according to rule, and yet not to be able to state what the rule is."

The lord justice found that there were three classes of cases in which the Courts had refused costs to a successful litigant. He then posed the question whether there was evidence of facts in the Court below on which the learned judge could find the case fell within one of the three classes. The inquiry is much narrower on a

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discretion as to which scale should be applied. So long as there was a basis for adopting the higher scale an appellate court will not interfere on a review of the issues involved. We are unable to say that the learned judge exercised his discretion wrongly. It was not an arbitrary decision but one based on a view which was open to the learned judge. This ground also fails.

Near the conclusion of argument counsel for appellants drew the attention of the Court to the fact that a copy of the Royal Gazette, referred to earlier in the discussion between counsel for the Board and counsel for appellants, was handed to the learned judge. It was suggested that this Court might peruse it since it was an admissible document. However, it was not tendered in evidence. We will not embark upon a comparison with its terms vis-a-vis the description of the land contained in the concession agreement. We do not propose to look at the document at this stage of the appeal.

The appeal is dismissed with costs and the judgment in the Court below is affirmed. No finding ought to be made on the cross-appeal in view of the comments earlier made and it will be struck out.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL